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No.

In The

Supreme Court of the United States

OCTOBER TERM, 1984

LAWRENCE VANDENPLAS and BARBARA VANDENPLAS,

Petitioners,

vs.

CITY OF MUSKEGO, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

ROBERT E. SUTTON
SUTTON & KELLY
1409 East Capitol Drive
Milwaukee, Wisconsin 53211
(414) 961-0802
Attorneys for Petitioners

CHAS. P. YOUNG COMPANY

QUESTION PRESENTED FOR REVIEW

Whether principles of comity and federalism underlying 28 U.S.C. § 1738 require a clear federal rule of claim preclusion in cases such as this where state law preclusion principles are indeterminate and ambiguous with respect to the specific claim submitted to the federal courts.

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Petitioner prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Seventh Circuit filed January 21, 1985.

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit was filed January 21, 1985 and is set forth in the Appendix, pages App. 1-11.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Petitioners owned real property located in the City of Muskego, Wisconsin. The property was not residential, but rather was used to raise crops and to ranch cattle, hogs, and sheep. Located on the property were a barn and a building used as a grainery. Over the years the surrounding area—which, like most of Waukesha County, Wisconsin had been farming land historically—came to be developed as residential property. Although petitioners had ongoing undisputed

legal rights to continue using the property for farming purposes, the contiguity of farming and residential property precipitated efforts by City officials to curtail this use. Between 1968 and 1980 this aim of the City officials was persistently thwarted by petitioners' entirely lawful resistance. In August, 1980 the Building Inspector for the City, acting pursuant to empowerment by the City government, ordered the barn and grainery razed under a scheme established by state law, § 66.05, Wis. Stats. The raze order violated petitioners' equal protection and due process rights under the Fourteenth Amendment in that it treated the premises significantly different than other comparable non-inhabited farm premises within the City's jurisdiction pursuant to a statute which does not allow sufficient notice, hearing, or remedies to satisfy due process of law. In addition, the order was imposed as retaliatory punishment for petitioners' exercise of First Amendment rights to disagree with the City, to resist it in the courts, and to maintain the farm usage of their property in the face of residential objection. Petitioners secured a temporary restraining order and review of the Building Inspector's order pursuant to the exclusive remedy provisions of § 66.05(3), Wis. Stats. A court order entered on September 8, 1980 stayed the raze order's execution for six months allowing petitioners to conduct repairs. On March 12, 1981 petitioners sought an extension of the stay order. This request was denied and petitioners appealed, obtaining an interim appellate stay. The Wisconsin Court of Appeals dissolved the interim appellate stay and dismissed the case on April 15, 1981 holding that the original trial court order of September 8, 1980 was final; that no stay could be granted by that court of the Building Inspector's raze order once it was found reasonable; and, therefore, that no further extension of that stay could be granted in March, 1981. Petitioners were informed that the buildings were to be burned on May 11, 1981. Another temporary restraint was granted and a hearing was held on May 11, 1981. The trial court dissolved the restraint and dismissed the case because the Wisconsin Court of Appeals had held that the original stay of the September 8, 1980 raze order was unlawful and no power to permit repair existed o[illegible] the

reviewing court decided that the Building Inspector was reasonable in his discretionary determinations of building violations and unreasonable costs of repair. On May 14, 1981, petitioners sought a federal injunction against the imminent execution of the original raze order. The following day the federal court denied the injunction and dismissed the complaint, *sua sponte*, without an evidentiary hearing. The buildings were destroyed on June 12, 1981. Petitioners commenced this action in the United States District Court for the Eastern District of Wisconsin pursuant to 42 U.S.C. § 1983 on August 5, 1981. By decision dated July 22, 1982 the Court granted defendants' Motion for Summary Judgment on the issues relevant to this petition based on the grounds of *res judicata/* claim preclusion. The Seventh Circuit Court of Appeals affirmed in a decision dated January 21, 1985. It is from this decision that the Petitioners now request the United States Supreme Court to grant this Petition for Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

I. The case provides the United States Supreme Court with the opportunity of formulating a federal rule of claim preclusion for situations where state preclusion principles are indeterminate and ambiguous in regard to the specific claim submitted to the federal courts.

The Court of Appeals' decision affirming the decision of the trial court was proper in initially looking to Wisconsin principles of claim preclusion to decide the effect to be given to petitioners' prior state actions. *Migra* v. *Warren City School Dist. Bd. of Educ.*, 465 U.S. , 104 S.Ct. 892 (1984). When those principles proved indeterminate however, the Court of Appeals indulged in "a creative interpretation of ambiguous state law." *Marrese* v. *American Academy of Orthopaedic Surgeons*, 53 L.W. 4265 at 4269 (1985) (Burger, C.J., concurring). When state law is indeterminate, the concerns of comity and federalism underlying 28 U.S.C. § 1738 do not come into play and a clear federal rule of claim preclusion would best promote the federal and substantive interest protected by the rules of preclusion. *Id.*

The *res judicata* effect of proceedings pursuant to § 66.05, Wis. Stats., on subsequent constitutional claims has never been specifically addressed by the Wisconsin courts. In such a situation the federal courts must look to the general rules of *res judicata* applied by the state. *Migra, supra; Lee* v. *City of Peoria*, 685 F.2d 196 (CA 7th 1982). Under Wisconsin law, a final judgment is conclusive in all subsequent actions between the same parties as to all matters *which were litigated* (issue preclusion) or *might have been litigated* (claim preclusion) in the former proceedings. *Barbian* v. *Linder Bros. Trucking Co.*, 106 Wis.2d 291, 316 N.W.2d 371, 374 (1982). There must be an identity of parties and *an identity of causes of actions or claims* in the two cases before a bar will be imposed. *Id.*

Recently, the Wisconsin Supreme Court expressly adopted a "transactional" approach in determining the identity of causes of actions or claims. *DePratt* v. *West Bend Mut. Ins. Co.*, 113 Wis.2d 306, 334 N.W.2d 883 (1983). This approach asseses claims in factual terms, making them coterminous with the transaction "regardless of the number of substantive theories, or variant forms of relief flowing from those theories, that may be available to the plaintiff...." *DePratt, supra*, 334 N.W.2d at 886 *quoting* the Restatement (Second) of Judgments, § 24 Comment A. (1982). The rationale for the adoption of the Restatement's "transactional" approach was Wisconsin's modern procedural system which "provides the parties with an adequate method of fully developing the entire transaction in one action going to the merits" and "permits the presentation ... of all material relevant to the transaction without artificial confinement to any single substantive theory or kind of relief without regard to historical forms of actions." *DePratt, supra*, 334 N.W.2d at 886 *citing* Restatement, *supra* § 24 Comment A. Based on these general principles of Wisconsin preclusion law, the Seventh Circuit Court of Appeals ruled that petitioners' claims would be barred in Wisconsin, hence the § 1983 claims must likewise be barred.

Although in most instances deductive reasoning from general principles to specific conclusions yields logical results, the Court of Appeals' decision in this case is nothing

less than "a creative interpretation of ambiguous state law." *Marrese, supra*, 53 L.W. at 4269 (Burger, C.J., concurring). Certainly the general principles of Wisconsin preclusion law, standing alone, might appear to bar petitioners' present action. Yet the express assumption behind those principles is a trial which provides "an adequate method of *fully developing the entire transaction*" and permits *"the presentation ... of all material relevant to the transaction without artificial confinement to any single substantive theory or kind of relief...."* (emphasis supplied) *DePratt, supra*, 334 N.W.2d at 886, citing Restatement, *supra* § 24 Comment A. The limited proceedings to challenge a § 66.05 raze order offered no such trial under these circumstances it is, to say the least, "ambiguous" whether the Wisconsin courts would apply the general rules of claim preclusion to the § 66.05 proceedings which directly contradict the rationale for those principles.

It is necessary then to recite the special mechanism Wisconsin law provides respecting the razing of buildings. Under § 66.05(a)(a), Wis. Stats., the building inspector of a city is permitted to make a discretionary judgment that certain buildings are so old, or so dilapidated, or so out of repair *as to be* dangerous, or unsafe, or unsanitary, or otherwise unfit *for* human habitation, or human occupancy, or human use. Phrased differently, the building inspector's permissive power to make such a discretionary judgment is limited only by the necessity for him to find one or more of three alternative statements of the conditions of the premises and one or more of four alternative statements of the effect of such a condition or conditions upon one or more of three human relationships to the buildings in question. But that is not all that the building inspector must find. He must also make a finding respecting whether the building is so "...old, dilapidated, or...out of repair..." "...that it would be unreasonable to repair the same...." That finding is aided by a statutory rebuttable, see *Posnanski* v. *City of West Allis*, 61 Wis.2d 461, 213 N.W.2d 51 (1973), presumption pursuant to § 66.05(1)(b), Wis. Stats., that it would be unreasonable so to repair when the cost of repair exceeds 50% of the property's value as established by § 66.05(1)(b)'s method of valuation. The consequence of a determination by

the building inspector that repair is unreasonable is to allow him to order the building razed. If no determination is made by the building inspector that repair is unreasonable, then the consequence is to require him to provide the building's owner with the option to repair in addition to the order to raze.

There is *only one method of judicial review under the statute, and it is,* by express legislative direction, *exclusive.* See § 66.05(3), Wis. Stats. See *Gehr* v. *Sheboygan*, 81 Wis.2d 117, 260 N.W.2d 30 at 34 and cases cited (1977); *Mohr* v. *City of Milwaukee*, 101 Wis.2d 670, 305 N.W.2d 174 at 177-178 (Wis. Ct. Apps. 1981). *Damage remedies are expressly eliminated.* Within 30 days of a raze order the owner must seek a judicial order restraining the building inspector from razing the building. The restraining order issues upon application and a hearing must be set within 20 days as a matter of statutory mandate.

At the hearing, the Court's *only function* is to determine whether the building inspector's exercise of discretion is reasonable or unreasonable. If it is reasonable, then the restraint must be dissolved. If it is unreasonable, then the restraint may be continued or modified. § 66.05(3), Wis. Stats.

Most importantly, if the building inspector has made a determination, aided by the presumption or otherwise, that repair is unreasonable, and if the reviewing court finds that the determination that repair is unreasonable made by the building inspector is a reasonable exercise of the inspector's discretion, *then* (a) the owner has no option to repair the premises, and (b) the court has no power to allow repair by the owner. *City of Appleton* v. *Brunschweiler*, 52 Wis.2d 303, 190 N.W.2d 545 (1971).

As the Court of Appeals noted, the constitutionality of § 66.05 has been discussed in appeals from § 66.05 orders. *Posnanski, supra*; *City of Appleton, supra.* However, the very language of those cases militate against the Court of Appeals' conclusion that petitioners' claims could have been raised as a defense to the reasonableness of the raze order. All of the considerations addressed by those courts deal with

factual issues concerning the conditions of the building and costs of repair. As the Court stated in *Posnanski*:

> "In any event the presumption expressed in the statute (which places a burden upon the property owner to show facts to the contrary), setting the benchmark of unreasonableness at 50 percent, cannot be challenged as unreasonable in this court. *Boden* v. *Milwaukee*, 8 Wis.2d 318, 99 N.W.2d 156 (1959); *State* v. *Laaks*, 171 Wis. 557, 177 N.W. 916 (1920). *Only* if a property owner can show that *the legislature's formula* operates arbitrarily in the individual case can a court, after due consideration of the legislature's declared public policy of ridding the state of old and dilapidated buildings, make a finding that a reconstruction in excess of the 50 percent limit be allowed." [Emphasis Added] 213 N.W.2d at 54.

Thus, the constitutionality of the 50 percent presumption, *per se, is beyond constitutional challenge* in deference to the police powers of the state. The *only* issue that may be addressed is whether the *formula* operates arbitrarily in relation to the cost of repairs. The question of arbitrariness relates only to whether the building inspector was reasonable in his discretionary determinations of building code violations and unreasonable costs of repair. If the building in this case existed in the condition contemplated in the statute, all other questions were foreclosed including whether the motivations for, and methods of enforcement violated petitioners' constitutional rights.

The limited nature of this proceeding renders the general preclusion principles of Wisconsin indeterminate. In such situations, a federal rule of claim preclusion is necessary. *Marrese, supra*, 53 L.W. at 4269 (Burger, C.J., concurring). The rule proposed by the Chief Justice is "that a party is precluded from asserting a claim that he had a 'full and fair opportunity' to litigate in a prior action. Cites omitted." *Id.* Applying this rule to petitioners, it is clear that no such opportunity existed. See, *Hagee* v. *City of Evanston*, 729 F.2d 510, 515 n.9 (CA7 1984). The very narrow scope of the reasonableness inquiry completely precluded petitioners from airing their constitutional claims. On these facts, this

Court should grant the Petition for a Writ of Certiorari and reverse the judgment of the lower court.

CONCLUSION

It is respectfully submitted that the Supreme Court should declare that Wisconsin principles of claim preclusion are indeterminate in regard to whether proceedings pursuant to § 66.05, Wis. Stats., to raze a building bar subsequent federal claims under 42 U.S.C. § 1983. Where state preclusion principles are indeterminate this Court should adopt a federal test assessing whether a party had a full and fair opportunity to litigate the claim. The Supreme Court should grant the Petition for Certiorari and reverse the judgment of the Court of Appeals for the Seventh Circuit.

Dated at Milwaukee, Wisconsin, this 5th day of April, 1985.

Respectfully submitted,

SUTTON & KELLY
By: Robert E. Sutton
Attorneys for Petitioners

APPENDIX

In the

United States Court of Appeals

For the Seventh Circuit

No. 83-2998

LAWRENCE VANDENPLAS and BARBARA VANDENPLAS,
Plaintiffs-Appellants,

v.

CITY OF MUSKEGO, et al.,
Defendants-Appellees.

Appeal from the United States District Court for
the Eastern District of Wisconsin.
No. 81 C 1043—John W. Reynolds, *Judge.*

ARGUED NOVEMBER 9, 1984—DECIDED JANUARY 21, 1985

Before WOOD and CUDAHY, *Circuit Judges,* and WISDOM, *Senior Circuit Judge.**

CUDAHY, *Circuit Judge.* This is an appeal from a final judgment entered on a jury verdict in an action for damages and declaratory relief under 42 U.S.C. § 1983. The plaintiffs, Lawrence Vandenplas and his daughter Barbara Vandenplas, sued the City of Muskego, Wisconsin, and various of its employees and elected and appointed officials for damages arising out of the allegedly uncon-

* The Honorable John Minor Wisdom, Senior Circuit Judge of the Fifth Circuit Court of Appeals, is sitting by designation.

stitutional manner in which the defendants razed two buildings on the Vandenplases' farm. The trial court granted summary judgment for all defendants except certain unnamed police officers. Plaintiffs were given leave to amend their complaint, did so, and reached a jury on the issue of unconstitutional use of force by the police officers. The jury found for the defendant officers. The plaintiffs now appeal the grant of summary judgment as to all other defendants and the jury verdict as to the police defendants.

I.

Lawrence Vandenplas and his wife Bernice own property in the City of Muskego on which, before the events recounted here, were located an old farmhouse and a barn which were used for storing grain and housing hogs respectively. The buildings had fallen into a state of disrepair, and on August 8, 1980, defendant Gerald P. Lee, the building inspector for the city, issued a condemnation order for both structures pursuant to § 66.05, WIS. STAT. (1979-80). That statute provides, in part, as follows:

> (1)(a) The governing body or the inspector of buildings * * * may order the owner of premises upon which is located any building or part thereof within such municipality, which in its judgment is so old, dilapidated or has become so out of repair as to be dangerous, unsafe, insanitary or otherwise unfit for human habitation, occupancy or use, and so that it would be unreasonable to repair the same, to raze and remove such building or part thereof, or if it can be made safe by repairs to repair and make safe and sanitary or to raze and remove at the owner's option[.] * * *
>
> (b) Whenever a municipal governing body, inspector of buildings or designated officer determines that the cost of such repairs would exceed 50 per cent

of the assessed value of such building divided by the ratio of the assessed value to the recommended value as last published by the state supervisor of assessments for the municipality within which such building is located, such repairs shall be presumed unreasonable and it shall be presumed for the purposes of this section that such building is a public nuisance.

* * *

(3) Anyone affected by any such order shall within the time provided by s. 893.76 apply to the circuit court for an order restraining the inspector of buildings or other designated officer from razing and removing the building or part thereof or forever be barred. Hearing shall be had within 20 days and shall be given precedence over other matters on the court's calendar. The court shall determine whether the order of the inspector of buildings is reasonable, and if found reasonable the court shall dissolve the restraining order, and if found not reasonable the court shall continue the restraining order or modify it as the circumstances require. Costs shall be in the discretion of the court. If the court finds that the order of the inspector of buildings is unreasonable, the inspector of buildings or other designated officer shall issue no other order pursuant to the authority of this section in regard to the same building or part thereof until its condition is substantially changed. The remedies provided in this subsection are exclusive remedies and anyone affected by such an order of the inspector shall not be entitled to recover any damages for the razing and removal of any such building.

* * *

(8)(c) Either the owner or the city or village may appeal to the court of appeals within 30 days from the date of entry of the order of the circuit court.

WIS. STAT. § 66.05 (1979-80).[1]

Pursuant to § 66.05, the Vandenplases filed suit in Waukesha County Circuit Court to enjoin the proposed destruction of the buildings. The court entered a temporary restraining order as required by the statute, and conducted a hearing on September 3 and 4, 1980. The building inspector testified to the condition of the building and the unreasonableness of repairs, Mr. Vandenplas testified to the agricultural use of the buildings and his intention to effect repairs and the judge viewed the property. The court entered an order on September 8, 1980, finding the raze order reasonable, but staying any demolition for six months to allow plaintiffs to repair the buildings. This order was not appealed.

The plaintiffs returned to the circuit court on March 12, 1981, seeking an extension of time to continue making repairs. The court entered a temporary restraining order as required by the statute, and held an evidentiary hearing on March 23, 1981, at which Mr. Vandenplas testified to the repairs he had made and would make. The court dissolved the temporary restraining order and refused to grant a further stay, finding substantial progress had not been made in repairing and restoring the buildings. The plaintiffs appealed to the Wisconsin Court of Appeals, which temporarily stayed the circuit court order. On April 15, 1981, the court of appeals vacated its temporary stay and dismissed the appeal, holding that the plaintiffs' failure to appeal the September 8, 1980, order barred them from challenging the reasonableness of the raze order or the denial of a permanent injunction. The appellate court further held that the circuit court had lacked authority to grant the original six month stay once it determined the raze order was reasonable. Plaintiffs did not seek further appellate review.

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[1] Section 66.05 has since been amended in ways not relevant to this appeal. *See* WIS. STAT. ANN. § 66.05 (West 1984).

On May 11, 1981, the City informed the Vandenplases that it would proceed with the razing of the buildings. Mr. Vandenplas sought and obtained a temporary restraining order from the circuit court. The court then held a hearing May 12, 1981, at which it confirmed its previous order allowing the razing of the buildings. Mr. Vandenplas then sought injunctive relief on due process and equal protection grounds in federal district court. The district court denied the motion for a temporary restraining order after a hearing and dismissed the complaint.

Finally the Vandenplases sought passage of a special resolution by the Common Council of the city allowing them to continue repairs and to avoid destruction of the buildings. The resolution was defeated, several individual defendants voting against it, allegedly with the consent of the mayor, also a defendant. On June 12, 1981, the buildings were razed by employees of the city public works department. Plaintiffs allege that during the demolition they were subjected to excessive force by the police defendants.

Plaintiffs seek a declaratory judgment that § 66.05 is unconstitutional on its face as providing inadequate notice and opportunity for hearing, and as applied to their property since the property was not in the condition complained of and was not significantly different from other uninhabited farm properties in the city which have not been subject to raze orders. They also allege that both the condemnation order and the refusal to grant a variance were motiviated by a desire to retaliate for Mr. Vandenplas's exercise of his First Amendment rights and his successful opposition to previous actions brought against him by the city. The plaintiffs also seek compensatory and punitive damages. The plaintiffs' claims were summarized by the district court as follows:

> "(1) The property owners, Mr. and Mrs. Vandenplas, sue the Building Inspector and the City of Muskego for razing their buildings rather than allowing them to repair them. It is alleged that such

behavior was in violation of the equal protection and due process clauses of the Fourteenth Amendment.

"(2) The property owners, Mr. and Mrs. Vandenplas, sue the Building Inspector, the Mayor, and the City of Muskego for razing their buildings. It is alleged that such behavior was retaliatory punishment against Mr. and Mrs. Vandenplas for exercising their rights to disagree with the City, resist it in the courts, and maintain their property as farm property in the face of residential objection.

"(3) The property owners, Mr. and Mrs. Vandenplas, sue the four-member majority of the Common Council, the Building Inspector, the Mayor, and the City for refusing a special resolution that would have permitted them to complete repairs and avoided destruction of the buildings. It is alleged that such refusal was retaliatory punishment against Mr. and Mrs. Vandenplas for exercising their rights to disagree with the City, resist it in the courts, and resist the original raze order.

"(4) The property owners, Mr. and Mrs. Vandenplas, and their daughter, Barbara, sue the Mayor, the Building Inspector and the Richard Roe police defendant for excessive force on the scene of the demolition of the buildings on June 12, 1981.

"(5) As to all of the above claims the City of Muskego is also a defendant on the basis of its indemnity liability under § 895.46, Wis. Stats., as to any individual defendant found liable, upon the basis that all defendants were acting within the scope of their respective employments.

"(6) As to claims (1) and (2) above the John Doe public works defendant is joined for executing the constitutional violations in the actual razing of the buildings."

Decision and Order of the district court, July 22, 1982, at 5 (quoting plaintiffs' brief answering defendants' motion for summary judgment at 8-9).

The district court granted summary judgment for defendants on claims (1) and (2) on the grounds that they were barred as *res judicata* by the state court proceedings. The court also held that claims (3) and (6) did not state actionable claims under the circumstances of this case. Thus summary judgment was granted on all but claim (4) and so much of claim (5) as related to indemnification for liability imposed on account of claim (4). The plaintiffs amended their complaint to name individual police officers, and claim (4) was tried to a jury. The trial court dismissed some of the named police officers after the plaintiffs' evidence, and the jury returned a verdict in favor of the remaining defendants. Plaintiffs appeal the grant of summary judgment on claims (1) and (2) as *res judicata* and on claims (3) and (6) for failure to state a claim upon which relief may be granted. Plaintiffs also appeal the jury verdict as against the weight of the evidence.

II.

A state court judgment must be given the same *res judicata* effect in federal court that it would be given in the courts of the rendering state. *Migra v. Warren City School District Board of Education*, 104 S. Ct. 892 (1984); *Mandarino v. Pollard*, 718 F.2d 845, 848 (7th Cir. 1983), *cert. denied*, 105 S. Ct. 116 (1984); 28 U.S.C. § 1738. *But see Marrese v. American Academy of Orthopaedic Surgeons*, 726 F.2d 1150 (7th Cir.) (*en banc*) (federal courts may give greater *res judicata* effect to state court judgments than would courts of rendering state), *cert. granted*, 104 S. Ct. 3553 (1984). This rule applies to § 1983 actions with respect to the issues actually litigated, *Allen v. McCurry*, 449 U.S. 90 (1980), and also issues which could have been

but were not litigated in the state court proceedings, *Lee v. City of Peoria*, 685 F.2d 196, 198-99 (7th Cir. 1982). *Migra v. Warren City School District Board of Education*, 104 S. Ct. 892 (1984). Thus our determination whether the Vandenplases' § 1983 claim is barred turns on the preclusive effect the various state court proceedings would have under the law of Wisconsin.

Wisconsin *res judicata* doctrine states that a final judgment is conclusive in all subsequent actions between the same parties as to all matters which were litigated or might have been litigated in the former proceedings. *DePratt v. West Bend Mutual Insurance Co.*, 113 Wis. 2d 306, 310, 334 N.W.2d 883, 885 (1983); *Barbian v. Lindner Bros. Trucking Co.*, 106 Wis. 2d 291, 316 N.W.2d 371 (1982); *Leimert v. McCann*, 79 Wis. 2d 289, 255 N.W.2d 526 (1977); *Gohn v. Beranek*, 266 Wis. 605, 64 N.W.2d 246 (1954).

Plaintiffs admit that their due process, equal protection and retaliation arguments were not raised in the state court proceedings, but argue that § 66.05 proceedings, which have been held to be the exclusive means of challenging a § 66.05 raze order, *Gehr v. City of Sheboygan*, 81 Wis. 2d 117, 260 N.W.2d 30 (1977); *Donley v. Boettcher*, 79 Wis. 2d 393, 255 N.W.2d 574 (1977), are relatively narrow, and that they could not raise their constitutional claims in the § 66.05 proceeding. Although it is true that the circuit court in a § 66.05 action may determine only the reasonableness or lack of reasonableness of the raze order and repairs, and may not order more repairs than are necessary to protect the public interest, *Donley v. Boettcher*, 79 Wis. 2d 393, 255 N.W.2d 574 (1977), it does not follow that the property owner cannot raise constitutional issues. A raze order issued in retaliation for First Amendment activities would not, indeed could not, be reasonable. A successful claim of unconstitutionality would be, in effect, an affirmative defense to the reasonableness of a raze order. And an affirmative defense not

raised cannot be used to collaterally attack the judgment in which it could have been but was not interposed. *Conway v. Division of Conservation, Dept. of Natural Resources*, 50 Wis. 2d 152, 183 N.W.2d 77, 81 (1971). In addition, the Wisconsin Supreme Court has considered challenges to the constitutionality of § 66.05 in § 66.05 proceedings. *Posnanski v. City of West Allis*, 61 Wis. 2d 461, 213 N.W.2d 51 (1973); *City of Appleton v. Brunschweiler*, 52 Wis. 2d 303, 190 N.E.2d 545 (1971). *See also Baker v. Mueller*, 222 F.2d 180 (7th Cir. 1955). Therefore, we conclude that the Vandenplases' claims could have been raised in the § 66.05 proceedings.

The fact that damages are not available in § 66.05 actions does not alter this result. If the Vandenplases had raised the constitutional issues and prevailed, the demolition would never have taken place, and there would be no damages to award. If the Vandenplases had not prevailed on the constitutional issues, there would be no constitutional violation for which to award damages.

The plaintiffs' reliance on *Barbian v. Lindner Bros. Trucking Co.*, 106 Wis. 2d 291, 316 N.W.2d 371, 374-75 (1982) is misplaced. In that case the Wisconsin Supreme Court adopted an exception to general *res judicata* principles, holding that a judgment in a claim for declaratory relief is only binding as to issues actually litigated and decided, and is not binding as to issues which might have been litigated but were not. The Vandenplases here sought injunctive, not declaratory, relief in the state proceedings. Judgments in injunctive proceedings, as distinguished from declaratory judgments, bar later litigation of issues which might have been raised but were not. *Leimert v. McCann*, 79 Wis. 2d 289, 293-94, 255 N.W.2d 526, 529 (1977); *Lee v. City of Peoria*, 685 F.2d 196, 199 (7th Cir. 1982). *See also State v. Donohue*, 11 Wis. 2d 517, 523, 105 N.W.2d 844, 847-48 (1960) (principle of *res judicata* not inapplicable if former adjudication is rendered in special proceeding rather than in traditional

common law action). Thus, the district court was correct in granting summary judgment on claims (1) and (2) as barred by *res judicata*.

Plaintiffs' second claim on appeal is that the trial court erred in dismissing claims (3) and (6) for failure to state a claim upon which relief could be granted. The Vandenplases' claim (3) is not that the Common Council was required to reconsider the raze order, but that it had the power to issue a special resolution revoking the raze order. The trial court was

> satisfied that the council members were entitled to rely on the judicial adjudication of the reasonableness of the raze order and to carry out the court order, whatever their motives in so doing, without fear of incurring liability for effectuating a valid court order.

Decision and Order of July 22, 1982, at 8. (The same reasoning was applied in dismissing claim (6) against the unnamed public works defendants.) The district court's reasoning seems too sweeping, but, at least as applied here, reaches the correct result. Although plaintiffs make conclusory allegations of retaliation, *see* Complaint ¶ 19, they have not sufficiently alleged, nor submitted any affidavits or evidence tending to show, that they were treated in a discriminatory manner by the city council. They do not, for instance, assert that the council had a general practice of passing special resolutions to reverse raze orders for structures belonging to others who were in the situation of the Vandenplases but who had not engaged in protected First Amendment activity. In a case where facts implicating the First Amendment *were* properly alleged, the motives of the members of the town council in relying on the state court adjudication would presumably be relevant. *Compare Hanover Township Federation of Teachers v. Hanover Community School Corp.*, 457 F.2d 456 (7th Cir. 1972) (affirming dismissal of action alleging retaliatory discrimination brought by 22 union

members where no allegation or evidence that individual contracts offered plaintiffs were less favorable than those accepted by non-union teachers or than those contracts defendants were required to offer to reinstated union leaders) *with McGill v. Board of Education*, 602 F.2d 774 (7th Cir. 1979) (evidence supported jury verdict that transfer of teacher from one school to another was in retaliation for protected speech; there were specific allegations of retaliatory motivation as evidenced by defendants' statements). Absent some such allegations, however, claims (3) and (6) fail to state a claim upon which relief may be granted, and summary judgment for the defendants was proper.

The final issue on appeal is the propriety of the jury verdict in favor of the defendant police officers. The question of credibility and weight of the evidence is within the purview of the jury, whose verdict cannot be lightly set aside so long as it has a reasonable basis in the record. *Lenard v. Argento*, 699 F.2d 874, 882 (7th Cir.), *cert. denied*, 104 S. Ct. 69 (1983). We view the evidence in the light most favorable to the prevailing parties. *Id.* The evidence in the present case included testimony by plaintiffs and their witnesses as well as by the police defendants. In addition, the jury watched two videotapes, one made by each side, of certain events involving the alleged excessive use of force. On reviewing the evidence, including the videotapes which both parties specially invited us to view, we find "there was a reasonable basis in the record for the jury verdict." *Id.* The verdict will not be disturbed.

For the reasons given above, the judgment of the district court will be, and is, AFFIRMED.

(2)

No. 84-1701

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In the Supreme Court of the United States

October Term, 1984

LAWRENCE VANDENPLAS and BARBARA VANDENPLAS,

Petitioners,

vs.

CITY OF MUSKEGO, JOHN JOHNSON, DAVID WOLFGRAM and GEORGE MIELKE,

Respondents.

On Petition For a Writ Of Certiorari To The United States Court of Appeals For The Seventh Circuit

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI

TIMOTHY F. MENTKOWSKI
Counsel of Record
RAYMOND J. POLLEN
Riordan, Crivello, Carlson & Mentkowski
710 North Plankinton Avenue
Milwaukee, Wisconsin 53203
(414) 271-7722
Attorneys for the Respondents

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QUESTION PRESENTED FOR REVIEW

Where Wisconsin principles of claim preclusion unambiguously act to bar the petitioners' claim, is there a sufficient question of federal law presented to compel the need for review?

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OPINIONS BELOW

The petitioners seek a writ of certiorari from an opinion of the United States Court of Appeals for the Seventh Circuit filed on January 21st, 1985 [Petitioners' Appendix, pp. A-1 through A-11; 753 F.2d 555 (7th Cir. 1985)], which had affirmed a Decision and Order of the United States District Court for the Eastern District of Wisconsin filed on July 22nd, 1982 [Respondents' Appendix, pp. A-1 through A-9].

STATUTES INVOLVED

(1) 28 U.S.C. § 1738:

State and Territorial Statutes and Judicial Proceedings; Full Faith and Credit. The Acts of legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

(2) Wisconsin Statutes § 66.05 (1979-1980):

[See Respondents' Appendix pp. A-11 through A-16].

No. 84-1701

In the Supreme Court of the United States

October Term, 1984

LAWRENCE VANDENPLAS and BARBARA VANDENPLAS,

Petitioners,

vs.

CITY OF MUSKEGO, JOHN JOHNSON, DAVID WOLFGRAM and GEORGE MIELKE,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI

STATEMENT OF CASE

On August 8th, 1980, Gerald Lee, Building Inspector for the City of Muskego, issued a Condemnation Order and Notice to Raze two buildings located on property at S63 W15697 West College Avenue in Muskego, Wisconsin. The property and buildings were owned by Bernice and Lawrence Vandenplas. The Vandenplases challenged that Order in the Circuit Court of Waukesha County under the statutory scheme provided in § 66.05 Wis. Stats. Within that challenge, they sought and secured a Temporary Restraining Order from the Circuit Court on August 25th, 1980, to prevent execution on the order until a hearing could be held on their challenge.

An evidentiary hearing was held in the Waukesha County Circuit Court on September 3rd and 4th, 1980, before Judge Max Raskin to consider the merits of the challenge to the Raze Order. Subsequently, on September 8th, 1980, Judge Raskin denied the Vandenplases' motion for injunctive relief and ordered the buildings to be razed pursuant to § 66.05. In addition, the Court allowed that execution of the order could be stayed for six months to provide an opportunity to repair or restore either or both buildings.

When the Vandenplases returned to the Waukesha Circuit Court to seek a further extension of time to effect repairs on March 12, 1981, Judge Robert McGraw issued a new Temporary Restraining Order prohibiting the razing and removal of the buildings until another hearing could be held. On March 23rd, 1981, Judge McGraw issued an order dissolving that Temporary Restraining Order after finding that the plaintiffs had failed to comply with the September 8th, 1980, court order. Judge McGraw held further that the relief requested by the plaintiffs was not timely pursuant to that order, and that the plaintiffs had failed to show substantial progress with respect to repairing or restoring either of the buildings as provided in the stay to the order of September 8th, 1980.

An appeal from Judge McGraw's order was filed on March 24th, 1981 and the Wisconsin Court of Appeals, Division II, stayed the Raze Order pending the appeal. On April 15th, 1981, the appeal was dismissed and the stay imposed by the Appeals Court was vacated. The three-judge court found that any further stay or extension beyond the September 8th, 1980 court order was inappropriate since the court had already determined the Raze Order to be reasonable. No further appellate review was pursued.

Following the dismissal of the appeal, the plaintiffs were notified by a letter from the attorney for the City of Muskego that the buildings would be razed on May 11th, 1981, and that any and all personal property should be removed from the premises prior to that time. Mr. Vandenplas countered by filing a Motion for Reconsideration with Judge Raskin together with a motion for another Temporary Restraining Order. However, on May 12th, 1981, Judge Raskin denied the request for a Temporary Restraining Order following another hearing.

On May 14th, 1981, the plaintiffs filed a Motion for a Temporary Restraining Order together with an Affidavit, a Motion for Preliminary Injunction and a Verified Complaint in the United States District Court for the Eastern District of Wisconsin, the Honorable Myron L. Gordon presiding. The Vandenplases' claims for declaratory and injunctive relief were considered by the court and on May 15th, 1981, Judge Gordon dismissed the Complaint on its merits on the court's own motion. No appeal was taken from this decision.

On June 9th, 1981, the plaintiffs requested a special resolution from the Public Welfare Committee of the Common Council of the City of Muskego to order an extension of the Condemnation Order and Notice to Raze the buildings. The requested special resolution was denied and on June 12th, 1981 the buildings were razed, pursuant to earlier court orders, by personnel of the Muskego Public Works Department. Police officers from the Muskego Police Department were on the scene to insure that the razing would be orderly. An altercation arose between officers of the Muskego Police Department and Lawrence and Barbara Vandenplas [the daughter of Lawrence and Bernice] when they attempted to interfere with the razing; each was arrested, charged with a violation of a Muskego City Ordinance and released.

On April 5th, 1981, a new Complaint was filed in the United States District Court for the Eastern District of Wisconsin by Lawrence, Bernice and Barbara Vandenplas seeking declaratory relief and compensatory and punitive damages under 42 U.S.C. § 1983 for:

1. Injuries and damages alleged to have resulted when buildings located at S63 W15697 West College Avenue in Muskego, Wisconsin, were condemned and razed; and

2. Unlawful arrest and excessive force allegedly resulting from an altercation with police at the razing.

Prior to the trial, the District Court granted the defendants' Motion for Summary Judgment and dismissed the plaintiffs' claims against: The City of Muskego; Muskego Mayor, Jerome J. Gott-

fried; Muskego Common Council Members Edwin Dumke, Robert Klenz and Wayne Radtke; Muskego Building Inspector, Gerald Lee; and unnamed employees of the Muskego Public Works Department. [Decision and Order — Respondents' Appendix, pp. A-1 through A-9]. The Court gave the Vandenplases an opportunity to amend their Complaint against individual officers of the Muskego Police Department for the unlawful arrest and excessive force claims.

Lawrence and Barbara Vandenplas filed an Amended Complaint seeking compensatory and punitive damages and named six officers of the Muskego Police Department: John Johnson, David Wolfgram, George Mielke, Bill Meeks, Frank Sturnot and James Budish. Following the plaintiffs' presentation of proof at trial, the District Court dismissed Officers Meeks, Sturnot and Budish after evidence had shown they were in no way connected with the plaintiffs' arrest. The Court also dismissed the claim for punitive damages.

The remaining claims went to a jury on the questions of excessive force and unlawful arrest and the jury returned a special verdict finding no constitutional deprivations to either Lawrence or Barbara Vandenplas and further found that neither had suffered damages. The Court entered judgment dismissing the plaintiffs' claims on October 27th, 1983. [Respondents' Appendix, p. A-10].

Lawrence Vandenplas appealed the District Court's decision on summary judgment and joined with his daughter, Barbara, in an appeal from the final judgment entered on the jury verdict. The Seventh Circuit Court of Appeals received briefs and heard oral argument before it affirmed the District Court, in a Decision filed on January 21st, 1985 [Petitioners' Appendix, pp. A-1 through A-11; 753 F.2d 555 (7th Cir. 1985)]. The plaintiffs now petition this Court for a Writ of Certiorari on the issue of claim preclusion and this response follows pursuant to Rule 22 of the United States Supreme Court Rules.

SUMMARY OF ARGUMENT

The petitioners in their brief fail to demonstrate the existence of an important question of federal law which requires a decision by

this Court. They are unable to support a charge that the Court of Appeals erred in applying Wisconsin principles of claim preclusion.

Rather, the record reflects consistent analyses concluding that Wisconsin state common law bars relitigation of issues which the petitioners could have raised in earlier proceedings in Wisconsin state courts. Further, no ambiguity nor indeterminancy can be acknowledged in the circumstances of this case which would compel the need for this Court to fashion a federal rule for claim preclusion.

ARGUMENT

THE FORMATION OF A FEDERAL RULE OF CLAIM PRECLUSION IS NOT COMPELLED WHERE BOTH LOWER COURTS HAVE DETERMINED THAT STATE PRECLUSION PRINCIPLES UNAMBIGUOUSLY BAR RELITIGATION OF ISSUES IN FEDERAL COURT WHICH COULD HAVE BEEN RAISED IN STATE COURT PROCEEDINGS.

Recent decisions by this Court reiterate that federal courts are required to give a state court judgment the same preclusive effect as would be given under the law of the state in which that judgment was rendered. *Allen v. McCurry*, 449 U.S. 90, 96 (1980). These principles may entitle a state court judgment to preclusive effect in a subsequent federal suit grounded in 42 U.S.C. § 1983, both as to issues that were actually decided as well as to those that could have been presented in the state court. *Migra v. Warren City School District Board of Education*, __ U.S. __, 79 L.Ed.2d 56, 63 (1984).

In the present case, the petitioners commenced proceedings in a state court to challenge the sufficiency of the order for the condemnation and razing of their buildings. After a panoply of proceedings in state and federal court, the City of Muskego was allowed to proceed and the buildings were razed. In their new federal court action, grounded in 42 U.S.C. § 1983, the petitioners again sought to challenge the order but also raised constitutional challenges to the statutes upon which officers and employees of the City of Muskego had relied in the condemnation and razing of the

buildings. Specifically, the petitioners charged that Wisconsin Statutes § 66.05, and the mechanisms to enforce it, were unconstitutional in that they denied due process and equal protection contrary to the Fourteenth Amendment to the United States Constitution. A similar challenge was rejected by the Wisconsin Supreme Court in *City of Appleton v. Brunschweiler,* 52 Wis.2d 303, 308, 190 N.W.2d 545 (1971).

The District Court reviewed the merits of this collateral attack to the Condemnation and Raze Order. It considered the preclusive effect of the earlier state court challenge to the Order under principles of Wisconsin law and determined that judgment to be final. As Chief Judge Reynolds stated in the Decision:

> Since the state court determination is a final adjudication of the reasonableness of the raze order, it disposes of the Vandenplases' objections to that order and they cannot now pursue a claim for damages on the ground that, for whatever reason, the order was not reasonable.

[Decision and Order, pp. 6-7; Respondents' Appendix pp. A-7.] The Court of Appeals for the Seventh Circuit came to a similar conclusion after an independent analysis of the claim preclusive effect of the Wisconsin state court judgment.

The petitioners now raise the references included in *Marrese v. American Academy of Orthopaedic Surgeons,* ___ U.S. ___, 53 U.S.L.W. 4265 at 4269 (1985); (Burger, C.J. concurring) to suggest, for the first time, that the statutory scheme created under § 66.05 may be fatally "indeterminate and ambiguous" [Petitioners' Brief at p. 3]. They assert that on these grounds the determination of Wisconsin law by the Court of Appeals may be rejected and replaced with a federal rule of claim preclusion fashioned by this Court.

This assertion provides an insufficient foundation to seek a Writ of Certiorari. *Haring v. Prosise,* ___ U.S. ___, 76 L.Ed.2d 595, 604 n.8 (1983). Further, it has been this Court's consistent policy to accept the reasonable construction of a state's laws by the Courts of Appeal, "... even if an examination of the state law issue without such guidance might have justified a different conclusion." *Bishop v. Wood,* 426 U.S. 341, 346 n. 10 (1976).

Moreover, neither the *Marrese* opinion nor the concurrence of the Chief Justice provide adequate support for an alternative conclusion. The petitioners have failed to reinforce their bare assertion of indeterminancy in the claim preclusion principles adopted by Wisconsin courts. This is admitted in the petition wherein they concede:

> Certainly the general principles of Wisconsin preclusion law, standing alone, might appear to bar petitioners' present action.

[Petitioners' Brief at p. 5.]

Finally, no significant limitations constrain the jurisdiction of a Wisconsin court which could create the need for an exception to Wisconsin preclusion law, merely because the petitioners' challenge was originally raised under Wisconsin Statutes § 66.05. State courts in Wisconsin have been free to consider constitutional challenges to a condemnation order and raze notice under that statutory scheme. *Posnanski v. City of West Allis,* 61 Wis.2d 461, 213 N.W.2d 51 (1973) and *City of Appleton v. Brunschweiler,* 52 Wis.2d 303, 190 N.W.2d 545 (1971) are only two examples of cases where such constitutional objections were made and considered. Similarly, Wisconsin courts have recognized the scope of their jurisdiction to include constitutional issues raised in claims under 42 U.S.C. § 1983 [See: *Doe v. Ellis,* 103 Wis.2d 581, 309 N.W.2d 375 (App. 1981)].

The fact that the petitioners failed to avail themselves of the full procedures provided by state law does not constitute a sign of their inadequacy. *Kremer v. Chemical Construction Corp.,* 456 U.S. 461, 485 (1982), *rehearing denied,* 458 U.S. 1133. Nor does it reflect indeterminancy since here the petitioners had refrained from raising *any* constitutional charges in the state court proceedings.

These principles of claim preclusion are also undiluted by the proscription on compensatory damages under § 66.05. As the Court of Appeals concluded:

> The fact that damages are not available in § 66.05 actions does not alter this result. If the Vandenplases had raised the constitutional issues and prevailed, the demolition would never have taken place, and there would be no damages to

> award. If the Vandenplases had not prevailed on the constitutional issues, there would be no constitutional violation for which to award damages.

Vandenplas v. City of Muskego, 753 F.2d 555, 559-560 (7th Cir. 1985).

Consequently, no exception to 28 U.S.C. § 1738 is suggested or desirable in this instance. Indeed, in the context of the procedural history of this case, an alternative conclusion would be at odds with the underlying goals of § 1738 including "... notions of comity, the need to prevent vexatious litigation and a desire to conserve judicial resources." *Migra v. Warren City School District Board of Education,* 79 L.Ed.2d at 64. The petitioners' choice to proceed in federal court upon different legal theories than those set forth in the state court challenge to the condemnation order and raze notice provide no basis for them now to circumvent Wisconsin principles of claim preclusion. *Kremer v. Chemical Construction Corp.,* 456 U.S. at 481 n.22; *Gohr v. Beranek,* 266 Wis. 605, 64 N.W.2d 246 (1954). On this basis, there is no foundation to form a federal rule of claim preclusion where Wisconsin principles clearly act to bar relitigation of the petitioners' claims.

CONCLUSION

The petitioners have failed to demonstrate a sufficient foundation for their request that this Court grant their petition. For the reasons stated in this response and upon the rationale of both lower court decisions, these respondents respectfully request that the Petition for the issuance of a Writ of Certiorari be denied.

Respectfully submitted,

TIMOTHY F. MENTKOWSKI
Counsel of Record
RAYMOND J. POLLEN
Riordan, Crivello, Carlson & Mentkowski
710 North Plankinton Avenue
Milwaukee, Wisconsin 53203
(414) 271-7722
Attorneys for Respondents.

APPENDIX
OF
RESPONDENTS

APPENDIX A

DECISION AND ORDER OF UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

Case No. 81-C-1043

LAWRENCE VANDENPLAS, BERNICE VANDENPLAS, and BARBARA VANDENPLAS, Plaintiffs,

v.

CITY OF MUSKEGO, JEROME J. GOTTFRIED, individually and in his official capacity as Mayor of the City of Muskego, EDWIN DUMKE, ROBERT KLENZ, KENNETH STEINBERG, and WAYNE RADTKE, individually and in their respective official capacities as members of the Common Council of the City of Muskego, GERALD P. LEE, individually and in his official capacity as Building Inspector of the City of Muskego, JOHN DOE, individually and in his official capacity as an employee of the Department of Public Works of the City of Muskego, and RICHARD ROE, individually and in his official capacity as a police officer of the City of Muskego, Defendants.

[Filed July 22, 1982]

This is an action for damages and declaratory relief brought pursuant to 42 U.S.C. § 1983. The court has jurisdiction under 28 U.S.C. § § 1331 and 1343. The action is before the court on the defendants' motion for summary judgment, which will be granted as to all defendants except Richard Roe, individually and in his official capacity as a police officer of the City of Muskego, and the City of Muskego as potential indemnitor of Richard Roe.

Lawrence Vandenplas and Bernice Vandenplas own property in the defendant City of Muskego on which there used to be located an old farmhouse and a barn used, respectively, for storing grain and housing hogs. On August 8, 1980, the defendant Gerald P. Lee, who is the building inspector for the City of Muskego, issued a condemnation order for the house and barn pursuant to § 66.05, Wis. Stats. That statute provides in relevant part:

"(1)(a) The governing body or the inspector of buildings *** may order the owner of premises upon which is located any building or part thereof within such municipality, which in its judgment is so old, dilapidated or has become so out of repair as to be dangerous, unsafe, insanitary or otherwise unfit for human habitation, occupancy or use, and so that it would be unreasonable to repair the same, to raze and remove such building or part thereof, or if it can be made safe by repairs to repair and make safe and sanitary or to raze and remove at the owner's option; ***

"(b) Whenever a municipal governing body, inspector of buildings or designated officer determines that the cost of such repairs would exceed 50 per cent of the assessed value of such building divided by the ratio of the assessed value to the recommended value as last published by the state supervisor of assessments for the municipality within which such building is located, such repairs shall be presumed unreasonable and it shall be presumed for the purposes of this section that such building is a public nuisance.

"***

"(3) Anyone affected by any such order shall within the time provided by s. 893.76 apply to the circuit court for an order restraining the inspector of buildings or other designated officer from razing and removing the building or part thereof or forever be barred. Hearing shall be had within 20 days and shall be given precedence over other matters on the court's calendar. The court shall determine whether the order of the inspector of buildings is reasonable, and if found reasonable the court shall dissolve the restraining order, ***.

> The remedies provided in this subsection are exclusive remedies and anyone affected by such an order of the inspector shall not be entitled to recover any damages for the razing and removal of any such building.
>
> "***
>
> "(8)(c) Either the owner or the city or village may appeal to the court of appeals within 30 days from the date of entry of the order of the circuit court."

Mr. and Mrs. Vandenplas filed suit in Waukesha County Circuit Court to enjoin the proposed destruction of their property. As required by the statute, the court entered a temporary restraining order. A hearing was held on September 3 and 4, 1980, at which Inspector Lee testified as to the dilapidated condition of the premises and his conclusion that the cost of repairs would exceed 50 per cent of the value of the the buildings, and Mr. Vandenplas testified as to the agricultural uses of the property and his intention to effect repairs. The judge also viewed the property.

On September 8, 1980, the court issued an order finding that the raze order was reasonable, but allowing the plaintiffs six months to repair and restore the buildings. That order was not appealed.

On March 21, 1981, the plaintiffs returned to circuit court seeking an extension of time to complete repairs. The court once again entered a temporary restraining order, but following an evidentiary hearing held on March 23, 1981, at which Mr. Vandenplas testified about the repairs done and contemplated, the court vacated the restraining order, finding that the plaintiffs had not made substantial progress toward repair and restoration. The Wisconsin court of appeals granted a stay of the circuit court order, but subsequently on April 15, 1981, dismissed the plaintiffs' appeal, finding that their failure to appeal the September 8, 1980, circuit court order barred them from challenging the reasonableness of the raze order or the circuit court's denial of a permanent injunction. Plaintiffs did not seek review in the Wisconsin Supreme Court.

The City notified the plaintiffs that on May 11, 1981, it would proceed with the destruction of their buildings. Once again Mr. Vandenplas sought and obtained a temporary restraining order in circuit court, another hearing was held, and on May 12, 1981, the court reaffirmed the previous orders allowing the destruction of the buildings to proceed. Mr. Vandenplas next sought injunctive relief in the United States District Court for the Eastern District of Wisconsin, naming Gerald Lee as a defendant and seeking relief from the raze order on due process and equal protection grounds. After a hearing on his motion for a temporary restraining order, the district court denied the motion and dismissed the complaint on its merits.

As a last resort, Mr. and Mrs. Vandenplas sought from the Common Council of the City of Muskego a special resolution to permit them to complete repairs and avoid the destruction of their property. Their request was voted down by the defendants Edwin Dumke, Robert Klenz, Kenneth Steinberg, and Wayne Radtke, who are members of the Common Council, allegedly with the consent of the defendant mayor, Jerome J. Gottfried, and on June 12, 1981, the house and the barn were destroyed.

Mr. and Mrs. Vandenplas and their daughter, the plaintiff Barbara Vandenplas, allege that on June 12, 1981, while their property was being destroyed, they were personally subjected to excessive force and to unlawful arrests by the defendant Richard Roe, an unknown police officer of the City of Muskego.

In this action the plaintiffs seek a declaratory judgment that § 66.05, Wis. Stats., is unconstitutional on its face and as applied. They contend that the statute provides inadequate notice and opportunity for hearing. They also contend that the statute should not have been applied to their property since it was not in the condition complained of and was not significantly different from other uninhabited farm properties within the City of Muskego which have not been singled out for condemnation. They also contend that the condemnation order was motivated by the defendants' desire to retaliate against Lawrence Vandenplas for exercising his First Amendment rights and successfully opposing previous actions brought against him by the City of Muskego. That desire

to retaliate is also alleged to constitute the motive for the Common Council's refusal to pass a special resolution in June 1981. The plaintiffs also seek compensatory and punitive damages for all of the alleged constitutional violations.

The plaintiffs' claims are summarized at pages 8-9 of their answering brief filed June 2, 1982:

> "(1) The property owners, Mr. and Mrs. Vandenplas, sue the Building Inspector and the City of Muskego for razing their buildings rather than allowing them to repair them. It is alleged that such behavior was in violation of the equal protection and due process clauses of the Fourteenth Amendment.
>
> "(2) The property owners, Mr. and Mrs. Vandenplas, sue the Building Inspector, the Mayor, and the City of Muskego for razing their buildings. It is alleged that such behavior was retaliatory punishment against Mr. and Mrs. Vandenplas for exercising their rights to disagree with the City, resist it in the courts, and maintain their property as farm property in the face of residential objection.
>
> "(3) The property owners, Mr. and Mrs. Vandenplas, sue the four-member majority of the Common Council, the Building Inspector, the Mayor, and the City for refusing a special resolution that would have permitted them to complete repairs and avoided destruction of the buildings. It is alleged that such refusal was retaliatory punishment against Mr. and Mrs. Vandenplas for exercising their rights to disagree with the City, resist it in the courts, and resist the original raze order.
>
> "(4) The property owners, Mr. and Mrs. Vandenplas, and their daughter, Barbara, sue the Mayor, the Building Inspector and the Richard Roe police defendant for excessive force on the scene of the demolition of the buildings on June 12, 1981.
>
> "(5) As to all of the above claims the City of Muskego is also a defendant on the basis of its indemnity liability under § 895.46, Wis. Stats., as to any individual defendant found liable, upon the basis that all defendants were acting within the scope of their respective employments.

"(6) As to claims (1) and (2) above the John Doe public works defendant is joined for executing the constitutional violations in the actual razing of the buildings."

I am satisfied that claims 1 and 2 above are barred by the prior state court proceedings and that claims 3 and 6 do not state actionable claims under the circumstances alleged in the complaint. Summary judgment will therefore be denied only on claim 4, and on claim 5 to the extent it relates to indemnification for any liability imposed on count 4.

A final adjudication precludes relitigation by the parties to the suit and those in privity with them of all matters which were litigated and all matters which might have been litigated. *Cromwell v. County of Sac,* 94 U.S. 351, 352 (1876); *Leimert v. McCann,* 79 Wis.2d 289, 293-294 (1977). A suit for injunctive relief is entitled to res judicata effect, *Leimert v. McCann,* supra, and it precludes a second suit for damages on the same cause of action. *Lambert v. Conrad,* 536 F.2d 1183, 1185-1186 (7th Cir. 1976); 18 Wright and Millers' *Federal Practice and Procedure,* § 445; 1B Moore's *Federal Practice* ¶ 0.410[1] at 1156. If, therefore, the relevant facts in the two actions are the same, but the plaintiff uses two different legal theories, the actions remain the same for res judicata purposes. *Kremer v. Chemical Construction Corp.,* 50 U.S.L.W. 4487, 4492-4493 and n. 22 (May 17, 1982). If the relevant facts are the same, but the plaintiff uses two different legal theories and asks for different relief, the actions still remain the same. *Gohr v. Beranek,* 266 Wis. 605, 64 N.W.2d 246 (1954).

The usual preclusion rules apply even though it is a federal statutory or constitutional claim which is precluded as a result of a prior state court adjudication, *Blankner v. City of Chicago,* 504 F.2d 1037 (7th Cir. 1974), cert. denied 421 U.S. 948; *Booth v. Lermont Manufacturing Corporation,* 440 F.2d 385, 388 (7th Cir. 1971), cert. denied 404 U.S. 916, and federal civil rights claims are no exception. *Allen v. McCurry,* 449 U.S. 90, 105 (1980).

Mr. and Mrs. Vandenplas brought suit in state court to prevent the destruction of their buildings. The state court found that the

raze order was "reasonable." While the Vandenplases did not raise their equal protection, due process, and First Amendment retaliation constitutional arguments in state court, the Wisconsin Supreme Court has made it clear that constitutional objections to the enforcement scheme set forth in § 66.05, Wis. Stats., may be raised in the context of a § 66.05 proceeding. See, e.g., *Posnanski v. City of West Allis*, 61 Wis.2d 461, 466-467, 213 N.W.2d 51 (1973); *Appleton v. Brunschweiler*, 52 Wis.2d 303, 190 N.W.2d 545 (1971). The Seventh Circuit has also made it clear that challenges to the motivations of city officials in issuing a condemnation order should be raised in a § 66.05 proceeding and are part of the reasonableness determination which the state court is called upon to make. *Baker v. Mueller*, 222 F.2d 180 (7th Cir. 1955). Since the state court determination is a final adjudication of the reasonableness of the raze order, it disposes of the Vandenplases' objections to that order and they cannot now pursue a claim for damages on the ground that, for whatever reason, the order was not reasonable.

The Vandenplases rely on *Barbian v. Lindner Bros. Trucking Company, Inc.*, 106 Wis.2d 291, 306 N.W.2d 308 (1982), for the proposition that a prior adjudication of a claim for injunctive relief does not foreclose a subsequent suit for damages. *Barbian* concerned a prior claim for declaratory relief. Some states, including Wisconsin, distinguish declaratory judgment actions from other types of actions and hold that they lead only to issue preclusion and not to claims preclusion, in other words that they foreclose only relitigation of matters actually decided and not of matters that might have been decided. See 18 Wright and Miller *Federal Practice and Procedure* § 4446. A suit for injunctive relief, in contrast, forecloses relitigation of all matters which were and which might have been litigated. Id., § 1445; *Lambert v. Conrad*, 536 F.2d 1183, 1185 (7th Cir. 1973).

I am aware that the mayor, the building inspector, and the common council members were not named as individuals in the state proceeding, which was brought against the City of Muskego. The plaintiffs allege that the individual defendants were all acting in their official capacities and under color of state law and,

accordingly, that the City of Muskego must indemnify them under § 895.46, Wis. Stats., for any liability imposed. At page 11 of their brief filed June 2, 1982, the plaintiffs make the point that the raze order on its face invokes the authority of the City of Muskego and that under the circumstances of this case the actions taken by the mayor, the building inspector, and the Common Council members were actions of the City itself. Consequently, as in *Lambert v. Conrad,* supra, at 1186, where the plaintiff's prior suit for injunctive relief against a board of regents was held to bar his civil rights suit for damages against employees of the board, "the difference in the identity of the defendants in the present action from those in the prior action is insufficient reason to prevent plaintiffs from being bound." See also *Omernick v. LaRocque,* 406 F.Supp. 1156, 1159 (W.D. Wis. 1976); *Gohr v. Beranek,* 266 Wis. 605, 64 N.W.2d 246 (1954).

Mr. and Mrs. Vandenplas also seek damages for the refusal of the Common Council members to grant a special resolution which would have permitted the Vandenplases to complete their repairs even after the state court proceedings were final and Mr. Vandenplas's federal suit for injunctive relief had been dismised. They allege that the refusal was in retaliation for the Vandenplases' prior exercise of their First Amendment rights.

The claim is that the Common Council under § 66.05 had the power to issue a special resolution, not that it had a legal obligation to reconsider the raze order after it had been upheld by the Wisconsin courts. While the court proceedings do not legally preclude the claim, which arose after the court proceedings had terminated, I am satisfied that the Council members were entitled to rely on the judicial adjudication of the reasonableness of the raze order and to carry out the court order, whatever their motives in so doing, without fear of incurring liability for effectuating a valid court order. For the same reason, I am satisfied that no liability can be attached to the John Doe public works employee for carrying out a valid court order.

Finally, Mr. and Mrs. Vandenplas and their daughter seek damages for the use of excessive force and their unlawful arrests

by Richard Roe, a police officer of the City of Muskego, which allegedly occurred while the buildings were being razed. Those claims are not foreclosed by the prior state court proceedings and the plaintiffs will be allowed a reasonable period of time, i.e. 60 days, to discover the identity of Richard Roe and to amend their complaint once his identity is discovered.

For the foregoing reasons,

IT IS ORDERED that the defendants' motion for summary judgment is granted and this action is dismissed with the exception of the plaintiffs' claim against the defendant Richard Roe, and their claim under § 895.46, Wis. Stats., against the City of Muskego based on indemnity liability as to Richard Roe.

Dated at Milwaukee, Wisconsin, this 22nd day of July, 1982.

UNITED STATES DISTRICT COURT
By: /s/ John W. Reynolds

JOHN W. REYNOLDS
Chief Judge

APPENDIX B

JUDGMENT ON JURY VERDICT OF UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

Civil Action File No. 81-C-1043

LAWRENCE VANDENPLAS
and BARBARA VANDENPLAS,

vs.

CITY OF MUSKEGO, JOHN JOHNSON,
DAVID WOLFGRAM, and GEORGE MIELKE.

[Filed October 27, 1983]

This action came on for trial before the Court and a jury, Honorable JOHN W. REYNOLDS, United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

It is ordered and adjudged that the plaintiffs take nothing, that the action be dismissed on the merits, and that the defendants recover of the plaintiffs their cost of the action.

Approved: /s/ John W. Reynolds Date: 10/27/83

JOHN W. REYNOLDS
Chief Judge

Dated at Milwaukee, Wisconsin, this 27th day of October, 1983.

SOFRON B. NEDILSKY
Clerk of Court

By: /s/ Rita Zvers

Deputy Clerk

APPENDIX C

Wisconsin Statutes Section 66.05 (1979-1980)

66.05 RAZING BUILDINGS; EXCAVATIONS

(1)(a) The governing body or the inspector of buildings or other designated officer in every municipality, except in towns situated in a county of less than 15,000 population upon complaint of a majority of the members of the town board the circuit court, may order the owner of premises upon which is located any building or part thereof within such municipality, which in its judgment is so old, dilapidated or has become so out of repair as to be dangerous, unsafe, insanitary or otherwise unfit for human habitation, occupancy or use, and so that it would be unreasonable to repair the same, to raze and remove such building or part thereof, or if it can be made safe by repairs to repair and make safe and sanitary or to raze and remove at the owner's option; or where there has been a cessation of normal construction of any building or structure for a period of more than 2 years, to raze and remove such building or part thereof. The order shall specify a time in which the owner shall comply therewith and specify repairs, if any. It shall be served on the owner of record or his agent where an agent is in charge of the building and upon the holder of any encumbrance of record in the manner provided for service of a summons in the circuit court. If the owner or a holder of an encumbrance of record cannot be found the order may be served by posting it on the main entrance of the building and by publishing as a class 3 notice, under ch. 985, before the time limited in the order commences to run.

(b) Whenever a municipal governing body, inspector of buildings or designated officer determines that the cost of such repairs would exceed 50 per cent of the assessed value of such building divided by the ratio of the assessed value to the recommended value as last published by the state supervisor of assessments for the municipality within which such building is located, such repairs shall be presumed unreasonable and it shall be presumed for the purposes of this section that such building is a public nuisance.

(c) Acts of municipal authorities under this section shall not increase the liability of an insurer.

(2)(a) If the owner fails or refuses to comply within the time prescribed, the inspector of buildings or other designated officer shall cause such building or part thereof to be razed and removed either through any available public agency or by contract or arrangement with private persons, or closed if unfit for human habitation, occupancy or use. The cost of such razing and removal or closing shall be charged against the real estate upon which such building is located and shall be a lien upon such real estate, and shall be assessed and collected as a special tax. When any building has been ordered razed and removed the governing body or other designated officer under said contract or arrangement aforesaid may sell the salvage and valuable materials at the highest price obtainable. The net proceeds of such sale, after deducting the expenses of such razing and removal, shall be promptly remitted to the circuit court with a report of such sale or transaction, including the items of expense and the amounts deducted, for the use of the person who may be entitled thereto, subject to the order of the court. If there remains no surplus to be turned over to the court, the report shall so state. If the building or part thereof is insanitary and unfit for human habitation, occupancy or use, and is not in danger of structural collapse the building inspector shall post a placard on the premises containing the following words: "This Building Cannot Be Used for Human Habitation, Occupancy or Use." And it is the duty of the building inspector or other designated officer to prohibit the use of the building for human habitation, occupancy or use until the necessary repairs have been made.

(b) Any municipality, inspector of buildings or designated officer may, in his official capacity, commence and prosecute an action in circuit court for an order of the court requiring the owner to comply with an order to raze or remove any building or part thereof issued under this section if the owner fails or refuses to do so within the time prescribed in such order, or for an order of the court requiring any person occupying a building whose occupancy has been prohibited under this section to vacate the premises, or any combination of such court orders. Hearing on such actions

shall be given precedence over other matters on the court's calendar. Costs shall be in the discretion of the court.

(c) Any person who rents, leases or occupies a building which has been condemned for human habitation, occupany or use shall be fined not less than $5 nor more than $50 or imprisoned not more than 30 days for each week of such violation, or both.

(3) Anyone affected by any such order shall within the time provided by s. 893.76 apply to the circuit court for an order restraining the inspector of buildings or other designated officer from razing and removing the building or part threof or forever be barred. Hearing shall be had within 20 days and shall be given precedence over other matters on the court's calendar. The court shall determine whether the order of the inspector of buildings is reasonable, and if found reasonable the court shall dissolve the restraining order, and if found not reasonable the court shall continue the restraining order or modify it as the circumstances require. Costs shall be in the discretion of the court. If the court finds that the order of the inspector of buildings is unreasonable, the inspector of buildings or other designated officer shall issue no other order pursuant to the authority of this section in regard to the same building or part thereof until its condition is substantially changed. The remedies provided in this subsection are exclusive remedies and anyone affected by such an order of the inspector shall not be entitled to recover any damages for the razing and removal of any such building.

(4) "Building" as used in this section includes any building or structure.

(5) If any building ordered razed or made safe and sanitary by repairs contains personal property or fixtures which will unreasonably interfere with the razing or repair of such building or if the razing of the building makes necessary the removal, sale or destruction of such personal property or fixtures the inspector of buildings or other designated officer may order in writing the removal of such personal property or fixtures by a certain date. Such order shall be served as provided in sub. (1). If the personal property or fixtures or both are not removed by the time specified

the inspector may store the same, or may sell it, or if it has no appreciable value he may destroy the same. In case the property is stored the amount paid for storage shall be a lien against such property and against the real estate and shall be assessed and collected as a special tax against the real estate if the real estate is owned by the owner of the personal property and fixtures. If the property is stored the owner thereof, if known, shall be notified of the place of its storage and if it be not claimed by the owner it may be sold at the expiration of 6 months after it has been stored. In case of sale the handling of the sale and the distribution of the net proceeds after deducting the cost of storage and any other costs shall be handled as specified in sub. (2) and a report made to the circuit court as therein specified. Anyone affected by any order made under this subsection may appeal as provided in sub. (3).

(5m) This section shall not limit powers otherwise granted to municipalities by other laws of this state.

(6) In any town, city or village in any county having a population of 500,000 or more no excavation for building purposes, whether or not completed, shall be left open for more than 6 months without proceeding with the erection of a building thereon. In the event any such excavation remains open for more than 6 months, the inspector of buildings or other designated officer in such town, village or city shall order that the erection of a building on the excavation begin forthwith or in the alternative that the excavation be filled to grade. The order shall be served upon the owner of the land or his agent and upon the holder of any encumbrance of record as provided in sub. (1). If the owner of the land fails to comply with the order within 15 days after service thereof upon him, the inspector of buildings or other designated officer shall cause the excavation to be filled to grade and the cost shall be charged against the real estate as provided in sub. (2). Subsection (3) shall also apply to orders issued under this subsection. This shall not be construed to impair the authority of any city or village to enact ordinances in this field.

(7) The action provided in sub. (1) for razing or removing a building on premises in a town situated in a county of less than

15,000 population shall be commenced in accordance with s. 801.02. The authenticated copy of the summons and the complaint shall be served upon the owner and occupant of and any holder of an encumbrance of record against the premises. Procedure shall be the same in all respects as the procedure in other civil actions so far as applicable. Subsection (3) shall not apply to such actions except the court may, upon a showing of hardship or other good cause, restrain for reasonable periods of time the razing or removal of a building or part thereof and the removal, sale or destruction of any personal property or fixtures therein. Costs shall be in the discretion of the court except as to persons found by the court to be acting maliciously in or about the commencement or prosecution of such action.

(8)(a) Whenever an owner of any building, dwelling or structure in any city or village permits the same, either as a result of vandalism or for any other reason, to deteriorate or become dilapidated or blighted to the extent where windows, doors or other openings or plumbing or heating fixtures or facilities or appurtenances of such building, dwelling or structure are either damaged, destroyed or removed so that such building, dwelling or structure offends the aesthetic character of the immediate neighborhood or produces blight or deterioration by reason of such condition, the building inspector or other designated officer of such city or village shall issue a written notice respecting the existence of such defect; such written notice shall be served on the owner of such building, dwelling or structure as set forth in sub. (1)(a) and shall direct the owner of such building, dwelling or structure to promptly remedy the defect within 30 days following the service of such notice.

(b) If such owner fails to remedy or improve the defect in accordance with the written notice furnished by the building inspector or other designated officer as set forth in par. (a), then after the expiration of the 30-day period specified in the written notice such building inspector or other designated officer shall apply to the circuit court of the county in which such building, dwelling or structure is located for an order determining that such building, dwelling or structure constitutes a public nuisance. As a part of the application for such order from the circuit court such building

inspector or other designated officer shall file a verified petition in which shall be recited the giving of such written notice, the defect or defects in such building, dwelling or structure, the owner's failure to comply with the notice and such other pertinent facts as may be related thereto. A copy of the petition shall be served upon the owner as provided in sub. (1)(a) and the owner shall have 20 days following service upon him in which to reply to such petition. Upon application by the building inspector or other designated officer the circuit court shall promptly set the petition for hearing. Testimony shall be taken by the circuit court with respect to the allegations of the petition and denials contained in the verified answer. If the circuit court after hearing the evidence with respect to the petition and the answer shall determine that the building, dwelling or structure constitutes a public nuisance, the court shall promptly issue an order directing the owner of such building, dwelling or structure to remedy the defect and to make such repairs and alterations as may be required. The court shall further set a reasonable period of time in which such defect shall be remedied and the repairs or alterations completed. A copy of such order shall be served upon the owner as provided in sub. (1)(a). The order of the circuit court shall state in the alternative that if the order of the court is not complied with within the time fixed by the court, then such building inspector or other designated officer may proceed to raze the building, dwelling or structure. All costs or disbursements with respect to such razing shall be as provided for in sub. (2)(a).

(c) Either the owner or the city or village may appeal to the court of appeals within 30 days from the date of entry of the order of the circuit court.

(d) Any building, which under par. (a) either as a result of vandalism or for any other reason is permitted to deteriorate or become dilapidated or blighted to the extent where windows, doors or other openings or plumbing or heating fixtures or facilities or appurtenances of such building, dwelling or structure are either damaged, destroyed or removed so that such building, dwelling or structure offends the aesthetic character of the immediate neighborhood and produces blight or deterioration by reason of such condition, is a public nuisance.